

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DAVID B. LOWRY,

Plaintiff,

vs.

KENNETH S. APFEL, in his capacity
as the Commissioner of the Social
Security Administration; DAN R.
HYATT; RILEY ATKINS; and
BENNETT ENGELMAN,

Defendants.

CV 99-1210-ST

OPINION AND ORDER

David B. Markowitz
Markowitz, Herbold, Glade & Mehlhaf, P.C.
Suite 3000, Pacwest Center
1211 S.W. Fifth Avenue
Portland, Oregon 97204

Attorneys for Plaintiff

William B. Youngman
Assistant United States Attorney
1000 S.W. Third Avenue
Portland, Oregon 97204-2902

Victoria Blais
Assistant Regional Counsel - Seattle Region
Special Assistant United States Attorney
701 5th Avenue, Suite 2900 M/S 901
Seattle, Washington 98104-7075

Attorneys for Defendants

1 REDDEN, Judge:

2 Magistrate Judge Stewart filed her Findings and Recommendation on March 2,
3 2000. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R.
4 Civ. P. 72(b). Decisions on dispositive issues under 28 U.S.C. § 636(b)(1)(B) are
5 reviewed de novo. United States v. Raddatz, 447 U.S. 667, 673 (1980); Bhan v. NME
6 Hospitals, Inc., 929 F.2d 1404, 1414 (9th Cir. 1991). When a party objects to any portion
7 of the magistrate's findings and recommendation, the district court must make a de novo
8 determination of that portion of the magistrate's findings and recommendation. 28
9 U.S.C. § 636(b)(1)(B); McDonnell Douglas Corp. v. Commodore Business Machines, 656
10 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982); United States v.
11 Remsing, 874 F.2d 614 (9th Cir. 1989).

12 Plaintiff and defendants have timely filed objections. I have, therefore, given the
13 file of this case a de novo review.

14 I disagree with defendants' position that plaintiff had an adequate remedy under
15 the Commissioner's disqualification regulations, the Hearings, Appeals and Litigation
16 Law (HALLEX) manual, interim procedures regarding bias or misconduct, and Program
17 Operation Manual System (POMS). It is true that plaintiff knew of and availed himself
18 of the procedures when he submitted bias and unfairness complaints to the Regional
19 Chief ALJ and to the Appeals Counsels. However, plaintiff was informed on
20 December 3, 1998 that an investigation of his complaints would be conducted; that
21 investigation is still pending. He was then informed by letter dated April 26, 1999 by the
22 Regional Chief ALJ (in response to a demand letter sent by plaintiff's attorneys) that
23 there was no statutory or regulatory authority for the relief plaintiff requested. The
24 Regional Chief ALJ went on to say that even if such authority existed, he would not use
25 it with respect to Lowry's complaints. Thus, I agree with Magistrate Stewart's conclusion
26 that the Commissioner's bias and unfairness procedures were inadequate and that
27 plaintiff had no other remedy for his complaints.

28 I also agree with Magistrate Stewart's conclusion that defendants' motion to

1 dismiss for lack of standing should be granted as to defendants Atkins and Engelma
2 without prejudice and with leave to replead.

3 Therefore, I ADOPT the Magistrate's Findings and Recommendation (doc. 26)
4 that:

5 (1) Defendants' motion to dismiss for lack of subject matter jurisdiction (doc. 5)
6 and for stay of scheduling order should be DENIED;

7 (2) Defendant's motion to dismiss for lack of standing (doc. 8) should be
8 DENIED as to defendants Hyatt and Apfel and GRANTED as to defendants Atkins and
9 Engelma without prejudice and with leave to replead;

10 (3) Defendant's motion to dismiss for failure to state a claim (doc. 14) should
11 be DENIED; and

12 (4) The current discovery and pretrial order dates should be stricken, discovery
13 stayed, and a new case schedule set after the pending motions are resolved.

14 IT IS SO ORDERED.

15 Dated this 7th day of June, 2000.

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18 S/S James A. Redden
19 James A. Redden
20 United States District Judge
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